Supreme Court, U.S.
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No. 96-570

In The

Supreme Court of the United States

October Term, 1996

ARTHUR R. SORKIN and S. DIANE SMITH,

Petitioners,

vs.

COUNTY OF SANTA CRUZ, a political subdivision of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

DWIGHT L. HERR, County Counsel
HARRY A. OBERHELMAN III,
Assistant County Counsel*
County of Santa Cruz
701 Ocean Street, Room 505
Santa Cruz, CA 95060
(408) 454-2040

Attorneys for Respondent County of Santa Cruz

**Counsel of Record*

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PRELIMINARY STATEMENT

This civil action was filed by Respondent, the County of Santa Cruz, seeking to enforce its zoning regulation which prohibits the keeping of more than four dogs on residentially zoned parcels. After a court trial in August 1992, the trial court rendered judgement for the County and issued a permanent injunction. The judgement was affirmed by the California Court of Appeal, Sixth Appellate District, in an unpublished opinion.

SUMMARY OF ARGUMENT

Petitioners seek review in this court on three issues. Their petition should be denied as the California Court of Appeal neither decided any unsettled important question of federal law which should be settled by this Court nor decided a federal question in a manner which conflicts with applicable decisions of this Court. Supreme Court Rule 10.1(c).

(1) Petitioners contend that the Notice of Violation recorded by the County violated due process. A ruling in favor of Petitioners on this issue would not alter the decision in this case. Petitioners are requesting an advisory opinion from this Court based on an undeveloped trial court record.

(2) Petitioners' contend that the Court of Appeal misapplied the "rational basis" standard in rejecting their equal protection challenge to the zoning regulation. This Court's precedent is well established in the zoning context that the classification must be upheld if there is any

reasonable conceivable state of facts that could provide a rational basis.

(3) Petitioners contend that they were not afforded criminal standards of due process in their civil injunction trial. This contention was properly rejected by the Court of Appeal for the failure to raise the issue in the trial court. Notwithstanding the failure to raise, the Court of Appeal correctly found that the level of due process which Petitioners received in the trial Court was consistent with this Court's jurisprudence.

STATEMENT OF THE CASE

The Court of Appeal's opinion adequately sets forth the facts for purposes of this petition. Petitioners' recitation of the case in their Petition for Certiorari misstates and omits facts which are key to an understanding of the decision of the Court of Appeal.

Petitioners housed at times thirty (30) dogs on their real property. Petitioners' fail to tell this Court that Respondent's residential zoning regulations, applicable to Petitioners' real property, expressly prohibit the keeping of more than four dogs. See Appendix G-22, Appendix to Petition for Writ of Certiorari. Both the trial court and the Court of Appeal found this express limitation on the numbers of dogs which may be kept in a residential zone district decisive in this case. See Appendices A-3 and B-3, Appendix to Petition for Writ of Certiorari.

Petitioners' mistake evidence presented at trial for findings of fact in connection with the defense of estoppel. Evidence was presented at trial that Petitioner Sorkin spoke by telephone with an unidentified Planning Department employee in 1986 who reportedly told him that there was no limit on the number of *animals* including dogs which could be kept on his property. Petitioners then allege that Respondent's Planning Department thereafter changed its interpretation and asserted that the number of *dogs* was limited to four. This allegation was disputed at trial; Respondent presented evidence that the restriction on the number of dogs at all relevant times in the past had always been four and that no interpretation was ever necessary on this point. The trial court held, without making a finding of fact, that Petitioners failed to meet their burden of proof as to their defense of estoppel. See Appendix B-5, Appendix to Petition for Writ of Certiorari.

Finally, Respondents inaccurately state that the Notice of Violation posted on their property and mailed to their address was a criminal citation under California Penal Code Section 836.5 and 853.6. The Notice of Violation gives the property owner notification of the alleged code violation, informs them of the right to request a meeting to contest the allegation and states the intent to record a Notice of Violation with the County Recorder. See Santa Cruz County Code Section 13.10.285, Appendix G-14, Appendix to Petition for Writ of Certiorari. Petitioners were never cited or charged with any criminal offense in connection with the keeping of some thirty (30) dogs on their property.

ARGUMENT

I

PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A QUESTION REGARDING THE SEIZURE OF REAL PROPERTY WITHOUT NOTICE OR HEARING

Petitioners suggest that the recordation of the Notice of Violation was without notice or hearing and that the Court of Appeal declined to order affirmative relief nor consider the issue of damages.

(A) Whether or not the Notice of Violation was recorded by Respondent with adequate due process has no effect on the trial court's judgement, affirmed by the Court of Appeal, enjoining Respondents from keeping more than four dogs their property.

(B) The Notice of Violation procedure was not made an issue at trial and therefore no record was developed as to the County's interest in adopting the procedure it did nor the nature of the safeguards provided.

(C) Petitioners' real property was not "seized" by the recordation of the Notice of Violation.

I-A

DUE PROCESS CHALLENGE TO NOTICE OF VIOLATION PROCEDURE WAS NOT DECIDED BY THE COURT OF APPEAL AND HAS NO EFFECT ON THE JUDGEMENT FOR RESPONDENT

The Notice of Violation recorded by Respondent has absolutely no impact on the trial court judgement or the decision of the Court of Appeal. Recordation of the

Notice of Violation was not a condition precedent to initiating this civil injunction action. The Notice of Violation was before the trial court based only on Petitioners' argument that the prayer, contained in their answer to the complaint, requested "such other and further relief as the court deems just", which therefore permitted Petitioners to request from the trial court a rescission of the Notice.[1] The trial court correctly held that since a zoning violation had been proved and injunctive relief was appropriate, Petitioners were not entitled to "such other and further relief". See Appendix B-6, Appendix to Petition for Writ of Certiorari. If the trial court had found that no zoning violation existed and gave judgement to Petitioners, then it could arguably have ordered an expungement of the Notice of Violation based on the prayer contained in the answer.

This Court has held that it does not render advisory opinions. *California v. Freeman*, 488 U.S. 1311, 1314, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989); *Communist Party v. S.A.C. Board*, 367 U.S. 1, 71-72, 81 S.Ct. 1375, 6 L.Ed.2d 625 (1961); *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789 (1945). A ruling that does not provide any relief to the prevailing party ignores the duty of

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[1] Petitioners also contend that the County of Appeal failed to consider the issue of damages arising out of the alleged failure to provide Due Process. Petitioners never sought damages in the trial court. No cross complaint was ever filed. Relief sought under the prayer in an answer is insufficient to bring the question of a defendant's monetary damages into the case. California Code of Civil Procedure Section 428.10; *Moskovitz v. Le Francois*, 121 Cal.App. 310, 313, 8 P.2d 1049 (1932).

the federal courts " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *Oil Workers v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960), quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895).

The trial court found that Petitioners kept more than four dogs on their property and that Respondent's zoning regulations clearly prohibited such a land use. The Court of Appeal agreed that the zoning regulations limited the numbers of dogs and affirmed the judgement. The validity of the process by which the Notice of Violation was recorded has no impact on the judgement rendered in favor of Respondent by the trial court. Entertaining this Petition will engage the Court in rendering an advisory opinion.

I-B

NOTICE OF VIOLATION IS NOT A SEIZURE OF PETITIONERS' PROPERTY

Assuming that the issue of the validity of the Notice of Violation were before this court, the Court of Appeal decision does not conflict with applicable decisions of this Court. The Notice of Violation procedure is set forth in Santa Cruz County Code Section 13.10.285.[2] The Notice

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[2] Petitioners contend that the Administrative Hearing Officer procedure, set forth in County Code Section 1.12.070(D) was adopted by the County in recognition that its notice and

of Violation[3] is first posted on the property and then a written notice of intent to record a Notice of Violation is mailed to the property owners. The notice contains advice to seek a meeting if the owners dispute the existence of the zoning violation. No meeting was ever requested or held in Petitioners' case. Recordation takes place to give notice to any potential buyer of the existence of zoning/building code violations.

Recordation of the Notice of Violation procedure under Santa Cruz County Code Section 13.10.285 does not constitute a seizure of property under *U.S. v. James Daniel Good Real Property*, 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). In *James Daniel Good*, this Court addressed the civil forfeiture of realty where the property owner lost the ability to possess, occupy, sell, use or rent the real property seized by the government. In this case, a recorded Notice of Violation does not restrict Landowners from possessing, occupying, using, renting or selling their real property. Petitioners presented evidence that they could not refinance their property unless and until the Notice of Violation was removed, i.e., by coming into compliance with the zoning regulations. However,

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hearing procedures applicable to Notices of Violation did not meet Due Process. The procedures for a hearing officer do not apply to the decision to record the Notice of Violation, made under Section 13.10.185, rather they constitute a remedy for seeking compliance for any county code violation and is alternative to a civil action such as was used in this case. The Notice of Violation procedure remains unchanged.

[3] The Notice of Violation is the title given both to the paper that is posted on the property and to the document which is ultimately recorded in the official records.

Petitioners were not restricted from exercising those facets of property ownership which this Court found to be withheld in *James Daniel Good*, 114 S.Ct. at 503. Indeed Petitioners admit that the Notice of Violation has no impact on their ability to sell their property because a sale would terminate the violation since the dogs, being personal to Petitioners' use of the property, would be removed before transfer of the property. (See Petition for Writ of Certiorari, page 11). The other cases referenced by petitioners are not similar. Recordation of the Notice of Violation is not a prejudgement monetary lien as in *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), nor the repossession of personal property as in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

I-C

COUNTY'S NOTICE OF VIOLATION PROCEDURE COMPORTS WITH DUE PROCESS

The record below is inadequate for this court to address the issue of due process under the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 95 S.Ct. 893, 47 L.Ed.2d 18 (1976). No evidence was taken as to the risk of erroneous deprivation by use of the procedures set forth in the County's Notice of Violation process, or the probable value, if any, of additional or substitute procedural safeguards. Nor was a record developed describing the County's interest, including the fiscal and administrative burdens that additional or substitute procedures would require. The Notice of Violation is

designed to give notice to potential buyers of the existence of code violations on property. The private interest affected is minimal to most property owners. There is no abridgement of the possession, use, sale or rental of the affected property.

However, the record does reflect that petitioners received some level of notice and an opportunity to be heard prior to the recordation of the Notice of Violation. The notice of intent informs the property owner of the alleged violation and gives an opportunity to seek a meeting to present evidence to the contrary. The notice is given by mail to the last address as set forth in the tax records and is posted on the property. The Notice of Violation was recorded after posting and mailing notice of Respondent's intent to record. Indeed, Petitioners were well aware of the County's contention that they were violating the zoning regulations long before the Notice of Violation was recorded.[4]

II

EQUAL PROTECTION ANALYSIS USED BY THE COURT OF APPEAL IS CONSISTENT WITH THIS COURT'S DECISIONS

Petitioners contend that the Court of Appeal's use of the "rational basis" equal protection analysis disregards the approach used by this Court in the regulatory takings

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[4] Petitioner Sorkin responded to the posting of the Notice of Violation on the property and denied the existence of any violation. The County Planning Department official responded in writing and re-affirmed the County's position.

area. Their argument is unsound. This action does not involve a regulatory taking, but is a zoning enforcement civil injunction action. Petitioners cite the appropriate equal protection standard, *Heller v. Doe*, 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993), which was used by the Court of Appeal. See Appendix A-4, Appendix to Petition for Writ of Certiorari. *Heller* states that: "Instead a 'classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " 125 L.Ed.2d at p. 270. "A state moreover has no obligation to produce evidence to sustain the rationality of a statutory classification." 125 L.Ed.2d at 271. "A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." 125 L.Ed.2d at 271.

It is not only rational, and devoid of speculation, but even finds some support in the trial court record, that dogs run in packs, attack other animals and produce noise and excrement. Those grounds are more than sufficient under the teaching of *Heller* to support the limitation on dogs in residential zone districts. Petitioners contend that a good reason must be advanced to support the legislative classification. Good reason judged by whom? A court? But this Court has stated that the judiciary should not act as a superlegislature judging the wisdom or desirability of legislative policy. Deciding whether a reason is a "good" reason is precisely the activity which this Court has long avoided in its equal protection analysis.

Petitioners cite *Romer v. Evans*, 517 U.S. ___, 116 S.Ct. 2326, 134 L.Ed.2d 855 (1996) which addressed a constitutional amendment which restricted the rights of homosexuals. This court in *Romer* did not alter its equal protection analysis in holding that Colorado, even under the rational basis test, could not bar the application of existing laws to homosexuals. 134 L.Ed.2d at p. 865. This Court also held that the initiative statute in *Romer* exhibited a desire to harm a politically unpopular group. Petitioners, as dog owners, are not members of any suspect classification which this court has heretofore recognized.[5] Nor is there any evidence whatsoever that the County's zoning regulation limiting the numbers of dogs was intended to harm a identifiable political group or any suspect class. The zoning regulations do not prohibit all dogs, only dogs in excess of four. The Court of Appeal decision does not conflict with any decision of this Court.

III

COURT OF APPEAL PROPERLY REJECTED PETITIONERS' ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL THAT CRIMINAL DUE PROCESS APPLIES TO THIS CIVIL INJUNCTION ACTION

Petitioners assert in their Petition before this Court what they asserted before the Court of Appeal but failed to assert before the trial court; that criminal law due process safeguards should apply in this civil injunction

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[5] Petitioners for the first time in this litigation call themselves members of a suspect classification. The allegations used by Petitioners to urge their membership are wholly outside the trial court record.

case. Despite the failure to raise this contention in the lower court, application of precedent from this Court clearly leads to the conclusion that the civil injunction proceeding is civil rather than criminal in nature. *In re Winship* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), (Juvenile charged with an act which is a crime if committed by an adult); *Hicks v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988), (use of a legislative presumption in proceedings for contempt for failure to pay child support); *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), (civil sanction after criminal conviction where the sanction was punishing not remedial).

Petitioners were confronted with an injunction and civil penalties in this action. The trial court issued a mandatory injunction and awarded $2,000 in civil penalties.[6] There was no potential for incarceration. The purpose of this action was remedial, to obtain compliance with the zoning regulations, not to punish. Petitioners have not demonstrated that the Court of Appeal decision conflicts with this Court's decisions.

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[6] As of the date of this Petition, Petitioners have not complied with the terms of the permanent injunction.

CONCLUSION

For the reasons set forth in this opposition, the Petition for Writ of Certiorari should be denied.

Dated: November 8, 1996

Respectfully submitted,

DWIGHT L. HERR
County Counsel, County of Santa Cruz
HARRY A. OBERHELMAN, III
Assistant County Counsel

Attorneys for Respondent County of Santa Cruz